Geopancar Sdn Bhd v Visage Engineering Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–3389 OF 2010
ABDUL MALIK ISHAK, MOHD HISHAMUDIN AND BALIA YUSOF JJCA
8 OCTOBER 2012

Contract — Damages — Liquidated ascertained damages — Whether damages proven by evidence — Whether pleaded — Whether trial judge erred in allowing damages

Anjung Bahasa Sdn Bhd ('Anjung Bahasa') appointed the defendant/respondent as the main contractor to build a new complex for Dewan Bahasa dan Pustaka. The defendant then appointed the appellant ('the plaintiff') to be the subcontractor to, inter alia, design, supply and install the diaphragm wall which included the basement and piling works. The works were said to have been completed and handed over to the defendant on or about 22 October 1998 and the defendant then issued the statement of final account of the subcontract ('SFA') to the plaintiff. The plaintiff contended that the outstanding amount of RM4,253,111.73 was due and owing from the defendant and when a certificate of final payment ('CFP') was issued, the defendant drew the plaintiff's attention to a debt of RM778,142.27 payable by the plaintiff to the defendant. In a winding up petition against the defendant, the winding up court held that, based on the CFP, the sum of RM778,142.27 was a disputed debt and dismissed the petition. The plaintiff submitted that the CFP was created by the defendant for the purposes of asserting a dispute in the winding up petition and it constituted an admission by the defendant of the value of work done by the plaintiff. The defendant disputed the plaintiff's claim and defended the action and counterclaimed for losses suffered by reason of the plaintiff's breach for delayed completion and defective works due to leakages and that the final sum computed showed the amount of RM778,142.27 as owing from the plaintiff to the defendant. The plaintiff's claim was dismissed and the High Court allowed the defendant's counterclaim. The plaintiff appeal and submittet that, inter alia, there were material errors to the findings of facts compounded by serious misconstruction of the facts by the learned High Court judge; and that there was lack of judicial analysis of the evidence which resulted in the lack of judicial appreciation of the facts and the law and that impinged the decision making process of the learned High Court judge.

Held, allowing the appeal with costs:

(1) The learned judge had misdirected himself as to the facts and the law.

Liquidated and ascertained damages ('LAD') were damages provided for if the contractor failed to complete by the contractual completion date or any extended date and could only be quantified when the date of completion was ascertained. The High Court judge, having decided that the plaintiff had failed to complete the construction works under the letter of award, had made his own findings and awarded LAD to the defendant (see para 26).

(2) The learned judge allowed the defendant's counterclaim for the total amount of RM4,256,000 as LAD, when in reality the defendant's pleaded case for the amount was for 'cost of financing' and that the evidence from the bank would be produced during the trial. However, no evidence was led by the defendant in open court during the trial to prove the claim for financial charges. On the facts, in awarding LAD to the defendant, the judge had decided that there was delay of 152 days at the rate of RM28,000 per day when the amended counterclaim of the defendant made reference to 153 days. Further, the rate of RM28,000 per day was not proved by the defendant other than relying on a debit note (see para 27(a)–(b)).

(3) Oral evidence by DW4 was inadmissible and thus DW4's evidence should have been disregarded. The learned High Court judge had failed to appreciate that there was no evidence advanced by the defendant to support its counterclaim pertaining to the matters, inter alia, back charges for works and services. There was no single receipt or invoice and no proper supporting documents to substantiate the deductions other than the debit note that had been produced in the court. The defendant had also failed to lead evidence in open court to show how the assessment, for the failure of the plaintiff to provide the ten years warranty for the leakage at basement walls and slab, was computed. The defendant had failed to prove its alleged loss and the failure must be held to be fatal (see paras 27(c), 31(b) & (d)).

(4) There was failure on the part of the learned High Court Judge to appreciate that, in the absence of any contractual provision for an extension of time to complete, time for completion would be set at large. In the circumstance, the counterclaim by the defendant for loss of financing charges should be dismissed. It was apparent that the learned High Court judge in allowing the counterclaim had failed to appreciate that the defendant had failed to prove many of the deductions asserted and advanced by the defendant. The plaintiff must therefore be entitled to the unpaid balance sum under the CFP in the sum of RM4,253,111.73 (see paras 31(g)–32).

[Bahasa Malaysia summary

Anjung Bahasa Sdn Bhd ('Anjung Bahasa') telah melantik defendan/responden sebagai kontraktor utama bagi membina sebuah kompleks baru Dewan Bahasa

dan Pustaka. Defendan kemudiannya melantik perayu ('plaintif') menjadi subkontraktor untuk, antara lain, mereka bentuk, membekal dan memasang dinding diafragma yang turut merangkumi kerja-kerja bawah tanah dan cerucuk. Kerja-kerja tersebut dijangka akan siap dan diserahkan kepada defendan pada atau kira-kira 22 Oktober 1998 dan defendan kemudiannya mengeluarkan penyata akaun akhir subkontrak ('SFA') kepada plaintif. Plaintif menegaskan bahawa jumlah yang belum dijelaskan sebanyak RM4,253,111.73 perlu dibayar oleh defendan dan apabila sijil pembayaran akhir ('CFP') telah dikeluarkan, defendan menarik perhatian plaintif kepada hutang sebanyak RM778,142.27 yang mampu dibayar oleh plaintif kepada defendan. Dalam petisyen penggulungan terhadap defendan, mahkamah penggulungan memutuskan bahawa, berdasarkan CFP, jumlah sebanyak RM778,142.27 adalah hutang yang dipertikaikan dan menolak petisyen tersebut. Plaintif menghujahkan bahawa CFP telah dibuat oleh defendan untuk menguatkan lagi pertikaian dalam petisyen penggulungan dan ia membentuk suatu pengakuan oleh defendan mengenai nilai kerja yang dilakukan oleh plaintif. Defendan mempersoalkan tuntutan plaintif dan membela tindakan dan menuntut balas bagi kerugian yang ditanggung oleh sebab pelanggaran plaintif atas kelewatan penyiapan dan kecacatan kerja disebabkan oleh kebocoran dan bahawa jumlah akhir yang dikira menunjukkan jumlah sebanyak RM778,142.27 yang perlu dibayar oleh plaintif kepada defendan. Tuntutan plaintif ditolak dan Mahkamah Tinggi membenarkan tuntutan balas defendan. Plaintif merayu dan menegaskan bahawa, antara lain, terdapat kesilapan material dalam dapatan fakta-fakta yang ditambah lagi dengan salah tafsir fakta yang serius oleh Yang Arif hakim Mahkamah Tinggi dan bahawa tidak terdapat analisa kehakiman dalam keterangan yang mana telah menyebabkan tiadanya pertimbangan kehakiman berkenaan fakta-fakta dan undang-undang dan telah mempengaruhi proses membuat keputusan oleh Yang Arif hakim Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Yang Arif hakim telah tersalah arah dari segi fakta dan undang-undang. Kerugian yang telah dilikuidasi dan ditentukan ('LAD') adalah kerugian yang diperuntukkan jika kontraktor gagal menyiapkan pada tarikh tamat kontrak atau mana-mana tarikh yang dilanjutkan dan hanya boleh dinyatakan kuantitinya apabila tarikh penyiapan telah ditentukan. Hakim Mahkamah Tinggi, setelah memutuskan bahawa plaintif telah gagal untuk menyiapkan kerja-kerja pembinaan di bawah surat award, telah membuat dapatan sendiri dan mengawardkan LAD kepada defendan (lihat perenggan 26).

(2) Yang Arif hakim membenarkan tuntutan balas defendan bagi jumlah sebanyak RM4,256,000 sebagai LAD, sedangkan realitinya kes yang diplidkan untuk jumlah tersebut adalah untuk 'kos pembiayaan' dan bahawa keterangan daripada bank akan dikemukakan semasa

perbicaraan. Walau bagaimanapun, tiada bukti telah dikemukakan oleh defendan di mahkamah terbuka semasa perbicaraan untuk membuktikan tuntutan bagi caj kewangan. Berdasarkan fakta, dengan pemberian award LAD kepada defendan, hakim telah memutuskan bahawa terdapat kelewatan 152 hari pada kadar RM28,000 sehari sedangkan tuntutan balas yang dipinda oleh defendan merujuk kepada 153 hari. Seterusnya, kadar RM28,000 sehari tersebut tidak dibuktikan oleh defendan selain daripada bergantung kepada nota debit (lihat perenggan 27(a)–(b)).

(3) Keterangan lisan oleh DW4 tidak boleh diterima dan oleh itu keterangan DW4 ini sewajarnya tidak diterima. Yang Arif hakim Mahkamah Tinggi telah gagal untuk menyedari bahawa tiada keterangan telah dikemukakan oleh defendan untuk menyokong tuntutan balas berkenaan perkara-perkara tersebut, antara lain, caj kebelakang untuk kerja-kerja dan perkhidmatan. Tiada sebarang resit atau invois dan tiada dokumen sokongan yang sah untuk mengesahkan potongan selain daripada nota debit yang telah dikemukakan di mahkamah. Defendan juga telah gagal memberikan keterangan di mahkamah terbuka untuk menunjukkan bagaimana penilaian, atas kegagalan plaintif untuk menyediakan jaminan sepuluh tahun bagi kebocoran pada dinding bawah tanah dan papak, telah dikira. Defendan telah gagal membuktikan kerugian yang dinyatakan dan kegagalan tersebut haruslah diputuskan sebagai memudaratkan (lihat perenggan 27(c), 31(b) & (d)).

(4) Terdapat kegagalan di pihak Yang Arif hakim Mahkamah Tinggi untuk mempertimbangkan bahawa, dengan ketiadaan apa-apa peruntukan kontrak bagi lanjutan masa untuk penyiapan, masa bagi penyiapan akan diberikan pelepasan. Dalam hal keadaan ini, tuntutan balas oleh defendan bagi kerugian caj pembiayaan seharusnya ditolak. Adalah jelas bahawa Yang Arif hakim Mahkamah Tinggi dalam membenarkan tuntutan balas tersebut telah gagal untuk mempertimbangkan bahawa defendan telah gagal membuktikan kebanyakan daripada potongan yang telah dihujahkan dan dikemukakan oleh defendan. Plaintif, oleh, itu berhak ke atas jumlah baki yang belum dibayar di bawah CFP berjumlah RM4,253,111.73 (lihat perenggan 31(g)–32).]

Notes

For a case on liquidated ascertained damages, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3980.

Cases referred to

Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 277, FC (refd)
Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1, PC (refd)
Narayanan v Kannamah [1993] 3 MLJ 730, HC (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57, SC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor [2007] 2 MLJ 221; [2007] 1 CLJ 552, CA (refd)
S Manickam & Ors v Ismail bin Mohamad & Ors [1997] 2 MLJ 90, HC (refd)
Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd [1993] 3 MLJ 25, SC (refd)
White Property Co Ltd v Birse Construction Ltd [1999] All ER (D) 1376, QBD (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ 1113, SC (refd)

Appeal from: Suit No S7–22–1121 of 2004 (High Court, Kuala Lumpur)

Khoo Guan Huat (Kamraj Nayagam and Jocelyn Lim with him) (Skrine) for the plaintiff (appellant).
Amarjeet Singh (SP Chanra with him) (SP Chanra) for the defendant (respondent).

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The parties in this appeal shall be referred to like what they were referred to before the High Court. Thus, Geopancar Sdn Bhd shall be referred to as the plaintiff while Visage Engineering Sdn Bhd shall be referred to as the defendant.

[2] The plaintiff filed a notice of appeal against the judgment of the High Court in:

(a) dismissing the plaintiff's claim for the sum of RM4,253,111.73 with interest thereon at the rate of 8%pa from 22 October 1998 to the date of

payment and/or at such other rate and/or for such other period as the High Court may think fit and costs; and in

(b) allowing the defendant's counterclaim for the sum of RM778,142.27 with interest thereon at the rate of 8%pa from 11 October 2002 to the date of full settlement and/or for a period as the High Court may think fit and costs.

THE FACTUAL MATRIX

[3] Anjung Bahasa Sdn Bhd ('Anjung Bahasa') wanted to build a new complex for Dewan Bahasa dan Pustaka and in order to undertake the construction project, Anjung Bahasa appointed the defendant as the main contractor. The defendant then appointed the plaintiff as a subcontractor to, inter alia, design supply and install the diaphragm wall which included the basement and piling works ('the construction works'). The appointment of the plaintiff as a subcontractor for the construction works by the defendant was by way of a letter of award dated 2 October 1997 and that letter of award can be seen at pp 545–546 of the appeal record at *Jilid* 6 and it was worded as follows:

> CADANGAN PEMBANGUNAN KOMPLEKS DEWAN BAHASA & PUSTAKA TERMASUK 4 TINGKAT BESMEN TEMPAT LETAK KERETA, SATU BLOK MENARA PEJABAT 33 TINGKAT DAN 4 PARAS PODIUM Dl ATAS LOT PT 35, SEKSYEN 69, JALAN LAPANGAN TERBANG, KUALA LUMPUR WILAYAH PERSEKUTUAN UNTUK TETUAN ANJUNG BAHASA SDN BHD SUB-CONTRACT FOR DESIGN, SUPPLY AND INSTALL DIAPHRAGM WALL, BORED PILE, BARRETE PILE, GROUND ANCHOR AND BASEMENT 3 RAFT - Letter of Award
>
> Further to our verbal instruction to commence work on 2-7-1997, we are pleased to confirm your appointment as sub-contractor to Visage Engineering Sdn Bhd to execute the above-mentioned sub-contract work in accordance with the following:

1.	Scope of Work	As per attached schedules
2.	Commencement date	2nd July, 1997
3.	Completion date	4th June, 1998 (for Basement 3a slab) Sectional handover 9th Jan, 1998 (for LG slab, Tower area)
4.	Work program	As per attached program
5.	Total amount of Sub-contract	RM15,200,000.00 (Ringgit Malaysia: Fifteen Million Two Hundred Thousand Only)
6.	Idling costs incurred to 1-10-1997 will be to Visage Engineering account.	

7. Variation works instructed to 1-10-1997 will be paid subject to verification of quantities and rates claimed.

It is noted that you will provide measures as necessary to prevent leakage at the basement walls and slab; and will provide a 10-year warranty to this effect.

It is also noted that the acidic nature of the soil requires concrete with cement content in excess of the norm, in those elements in contact with the soil. This will be provided by you to the satisfaction of the Structural Engineer.

This is a lump-sum fixed-price sub-contract, with the exception of Bill No 3 (Foundation Bored Piles). Bill No 3 will be remeasured; any reduction in the remeasured Bill total will be shared equally by VESB and Geopancar Sdn Bhd. Any increase in the remeasured Bill total will be absorbed in entirety by Geopancar Sdn Bhd (ie. the maximum payable under the Bill is a ceiling of RM2,206,671.50).

You will be required to execute in due course a formal Sub-Contract Agreement. However, pending formalisation of the Sub-Contract, this Letter of Award shall constitute a legal and binding contract between you and us.

This letter is sent to you in triplicate copies. Please retain one (1) copy for your own record and return to us the original and one (1) copy duly signed and witnessed for our further action.

[4] The letter of award contained the essential terms of the subcontract with other terms that came into existence through subsequent verbal discussions between the parties and included the correspondences exchanged between the parties.

[5] Inter alia, the letter of award contained the following terms:

Commencement date: 2.7.1997

Completion date: 4.6.1998

(for Basement 3a slab)

Sectional handover 9.1.1998

(for LG slab, Tower area).

Contract sum: RM15,200,000.00

Idling costs incurred to 1.10.1997 will be to the defendant's account.

Variation works instructed to 1.10.1997 will be paid subject to verification of quantities and rates claimed.

[6] The plaintiff as a subcontractor carried out the construction works. Construction works were said to have been completed and was handed over to the defendant on or about 22 October 1998.

[7] The defendant issued a letter dated 9 December 1999 to the plaintiff enclosing the statement of final account of the subcontract ('SFA') as reflected at pp 580–592 of the appeal record at *Jilid* 7.

[8] After the issuance of the SFA, the defendant made a further payment of RM20,000 by way of a cheque vide MBB Cheque No 703042 dated 8 February 2002. With this additional payment, the total amount paid by the defendant to the plaintiff came up to RM11,120,000. The plaintiff accepted that there was a deduction of RM89,436.84 as referred to in item D2 of the SFA. But the plaintiff contended that there was no provision in the letter of award which entitled the defendant to withhold the amount of RM773,127.43 as referred to in item D1 of the SFA. By way of an alternative, the plaintiff contended that the amount of RM773,127.43 was due to be released by the defendant to the plaintiff.

[9] It was pointed out that the outstanding amount due and owing is RM4,253,111.73 which is the amount which the plaintiff is now claiming from the defendant. And the calculations were said to be as follows:

Balance amount due:	RM3,499,984.30
Additional amount paid to the plaintiff on 8.2.2002:	(minus RM20.000.00)
Retention sum due to be returned/released to the plaintiff:	(plus RM773,127.43)
Total amount due and owing and payable to the plaintiff:	RM4,253,111.73.

[10] By way of a letter dated 18 August 2000, the plaintiff demanded the amount of RM4,253,111.73 from the defendant. But the defendant played possum and has failed, refused and/or neglected to pay the outstanding amount to the plaintiff. The letter of demand dated 18 August 2000 can be seen at p 407 of the appeal record at *Jilid* 5 and it was worded as follows:

> Dear Sirs,
>
> RE: PROPOSED DEWAN BAHASA & PUSTAKA COMPLEX ON LOT PT 35, SEKSYEN 69, JLN LAPANGAN TERBANG, KL - Design Submission
>
> We refer to the above matter, our letter to you dated 30 December 1997 and your letter dated 17 August 2000.
>
> Kindly take note that we reserve all our rights in this matter.
>
> Should you proceed to instruct your Consultant to undertake to carry out / endorse the design works in which we have already executed, we will hold you and your consultant fully responsible for all the consequences resulting from your actions including the breach of agreement, infringement of our copy rights and contravention of the Code of the Professional Conduct and Ethics.

> In fact, despite that we have completed our works in early November 1998, you have to date failed in your primary duty to pay us RM4,273,111.73 (after taking into account the retention sum), which is the balance of the value of the works done as reflected in the statement of the Sub-contract Final Account issued to us by yourself on 9 December 1999.
>
> In the circumstances, TAKE NOTICE that you are now required to pay us RM4,273,111.73 within 14 days hereof, failing which we shall have no hesitation in commencing legal proceedings against you for the recovery of the said sum, together with interest thereon and costs.

[11] Approximately on 11 October 2002, the defendant issued a certificate of final payment ('CFP') as reflected at pp 540–541 of the appeal record at *Jilid* 6 and in the covering letter the defendant drew the plaintiff's attention to a debt of RM778,142.27 payable by the plaintiff to the defendant.

[12] It was pointed out that it is not disputed that the revised contract sum is RM15,462,548.57 and the total amount paid by the defendant to the plaintiff is RM11,120,000.

[13] On 19 April 2004, the plaintiff filed the writ of summons and the statement of claim against the defendant. But prior to that, a winding up petition vide No D5–28–208 of 2002 was filed against the defendant by Ng Chai Hin Marketing Sdn Bhd on 23 May 2002 in the Kuala Lumpur High Court. The plaintiff applied to intervene in the winding up petition by filing a notice of motion to be substituted as a petitioner and the winding up court allowed the plaintiff to be substituted on 15 October 2002 as a petitioner. The winding up court accepted the defendant's arguments that based on the CFP which showed that the plaintiff owed the defendant the sum of RM778,142.27, the debt was disputed and so the winding up petition was dismissed on 27 August 2003.

[14] It is the plaintiff's stand that the CFP was created by the defendant for the purposes of asserting a dispute in the winding up petition. It is also the plaintiff's stand that the CFP operated in favour of the plaintiff because it constituted an admission by the defendant of the value of work done by the plaintiff.

[15] The defendant disputed the plaintiff's claim and defended the action and also counterclaimed for losses suffered by reason of the plaintiff's breach for delayed completion and defective works due to leakages and that the final sum computed showed the sum of RM778,142.27 as owing from the plaintiff to the defendant with interest thereon.

ANALYSIS

[16] The plaintiff's claim hinged on the admission by the defendant of the

amount due to the plaintiff in regard to the construction works carried out by the plaintiff pursuant to the letter of award dated 2 October 1997. The admission is captured in two documents issued by the defendant, namely, the SFA issued under cover letter dated 9 December 1999 and the CFP dated 11 October 2002.

[17] For ease of reference, the SFA is now reproduced:

		STATEMENT OF FINAL ACCOUNT	
		RM	RM
A.	ORIGINAL SUB-CONTRACT SUM		15,200,000.00
B.	VARIATION WORKS	Omission	Addition
1.	Remeasurement of Bored Piling (refer Attachment A)	(13,343.00)	
2.	Variation Omission (refer Attachment B)	(116,332.10)	
3.	Variation Addition (refer Attachment C)	----------	392,223.67
		(129,675.10)	392,223.67
	Nett Addition		262,548.57
C.	FINAL REVISED SUB-CONTRACT SUM		15,462,548.57
D.	DEDUCTIONS		
1.	Retention sum (5% of Revised Sub-Contract Sum)		(773,127.43)
2.	Other Deductions (refer Attachment D)		(89,436.84)
3.	Previous payment to Sub-Contractor		(11,100,000.00)
	Balance Amount Due:		3,499,984.30.

[18] And for ease of reference, the CFP is also reproduced:

		CERTIFICATE OF FINAL PAYMENT	
		RM	RM
A.	ORIGINAL SUB-CONTRACT SUM		15,200,000.00
B.	VARIATION WORKS	Omission	Addition
1.	Remeasurement of Bored Piling (refer Attachment A)	(13,343.00)	
2.	Variation Omission (refer Attachment B)	(116,332.10)	
3.	Variation Addition (refer Attachment C)	----------	392,223.67
		(129,675.10)	392,223.67
	Nett Addition		262,548.57
C.	FINAL REVISED SUB-CONTRACT SUM		15,462,548.57
D.	DEDUCTIONS		
1.	Back Charges for Works and Services Rendered on behalf of Geopancar Sdn Bhd (DN No. DBP/001)		(104,690.84)
2.	Monetary Deduction for Non Provision of 10 years Warranty against Leakage of Basement Walls and Slab (DN No. DBP/002)		(760,000.00)
3.	Damages for Late Completion of Contract Works causing Delay to Overall Completion of the Project (DN No. DBP/003)		(4,256,000.00)
4.	Previous payment to Sub-Contractor		(11,120,000.00)
	Balance Amount Due:		(778,142.43).

[19] It is apparent that both the SFA and the CFP accepted that the final

revised subcontract sum is in the sum of RM15,462,548.57. And according to the SFA, the sum of RM11,100,000 was previously paid to the plaintiff. While according to the CFP, the sum previously paid to the plaintiff was RM11,120,000. Thus, the balance sum due and owing to the plaintiff would be dependent on the defendant's ability to prove its right to deductions from that balance.

[20] The High Court dismissed the plaintiff's claim and allowed the defendant's counterclaim. The summary of the High Court's decision can be seen at pp 41–42 of the appeal record at *Jilid* 1 and it reads as follows:

> Rumusan:
>
> Oleh kerana plaintif sebagai sub-kontrak di dalam projek yang ditawarkan oleh defendan itu dari kerja-kerja lukisan hingga kepada pembinaan dan keluarkan jaminan, ternyata dari surat menyurat dan keterangan saksi terutamanya saksi bebas SD5 konsultan projek, pihak plaintif gagal menyempurnakan projek tersebut dan gagal memberi jaminan 10 tahun yang dijanjikan dan juga kelewatan telah berlaku sehingga pada penghujung tahun 2002 masih lagi berlaku kecacatan-kecacatan atas projek tersebut.
>
> Pihak defendan pada awalnya berlembut dan mengalah dengan pihak plaintif kerana bimbang jfka plaintif mengabaikan projek ini maka defendan terpaksa mencari kontraktor baru bukan sahaja sukar diperolehi dengan kadar segera malah defendan berlarutan akan lewat dan menanggung gantirugi atas kelewatan tersebut. Akhirnya pihak defendan terpaksa membaik pulih kecacatan kerja-kerja plaintif apabila berlarutan sehingga tuanpunya tidak sabar untuk menunggunya lagi.
>
> Atas alasan-alasan ini saya menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan dengan kos.

[21] We were urged to intervene and set aside the decision of the High Court. According to learned counsel for the plaintiff, the following scenarios warrant appellate intervention:

(a) there were material errors in regard to the findings of facts compounded by serious misconstruction of the facts by the learned High Court judge; and

(b) there was a lack of judicial analysis of the evidence which resulted in the lack of judicial appreciation of the facts and the law and that impinged the decision making process of the learned High Court judge.

THE FIRST SCENARIO

[22] Now, at para 6 of the grounds of judgment of the learned High Court judge at p 40 of the appeal record at *Jilid* 1, His Lordship noted that the plaintiff was only relying on the SFA:

A … semata-mata bergantung pada 'statement of sub-contract final account' yang tidak ditandatangani oleh plaintif dan defendan.

[23] In reality, the plaintiff relied on both the SFA and the CFP.

B

[24] Continuing further at para 6, His Lordship noted that (from pp 40–41 of the appeal record at *Jilid* 1):

C Wakil atau pekerja plaintif yang menghadiri mesyuarat dengan pihak defendan iaitu Encik Pang Tse Fui gagal dipanggil, jika dibandingkan keterangan langsung dari saksi defendan ternyata saksi plaintif SP1 semata-mata tidak dapat menafikan maupun mengesahkan apa yang terkandung di dalam mesyuarat tersebut. Pihak plaintif juga gagal menjelaskan kenapa saksi-saksi mereka gagal dipanggil.

D

[25] Paragraph 6 of the judgment of the learned High Court judge made no mention that the plaintiff's documentary evidence was considered. To compound the matter further, nowhere in the grounds of judgment has His Lordship taken into consideration the retention sum which is due to be E released to the plaintiff.

[26] With respect, the learned High Court judge had decided that the plaintiff had failed to complete the construction works. Yet, His Lordship F made his own findings when awarding liquidated and ascertained damages ('LAD'). It is trite law that LAD are damages provided for if the contractor fails to complete by the contractual completion date or any extended date. And that LAD could only be quantified when the date of completion is ascertained (*Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 (PC)). It follows G therefore that when His Lordship in deciding that the plaintiff had failed to complete the construction works under the letter of award and yet awarded LAD to the defendant, His Lordship has misdirected himself as to the facts and the law.

H

[27] With respect, His Lordship had also misdirected himself in the following manner:

(a) when he allowed the defendant's counterclaim for the total amount of I RM4,256,000 as LAD, when in reality the defendant's pleaded case for such an amount was for 'cost of financing' and that the evidence from the bank would be produced during the trial. In the amended counterclaim, the defendant averred at pp 71–72 of the appeal record at *Jilid* 1 at para 24 as follows:

> 24. Defendan telah mengirakan kerugian yang diakibatkan oleh plaintif adalah sebanyak RM4,256,000.00 dan mengatakan bahawa ia mempunyai hak untuk set-off dari amaun yang perlu dibayar kepada plaintif di bawah kontrak tersebut.
>
> Amaun yang tersebut di atas ini telah dikirakan oleh defendan berdasarkan kos kewangan/pembiayaan atau 'cost of financing' yang diperlukan oleh defendan bagi satu hari bagi projek tersebut adalah RM28,000.00. Kos ini adalah termasuk kos pinjaman yang diambil oleh defendan dari bank. Defendan akan memberi bukti dan penjelasan lanjut di perbicaraan kelak.

But unfortunately, no evidence was led by the defendant in open court during the trial to prove the claim for financial charges;

(b) in awarding LAD to the defendant, he had decided that there was a delay of 152 days at the rate of RM28,000 per day. It must be stated here that the defendant's amended counterclaim at para 21, made reference to a delay of 153 days (see p 71 of the appeal record at *Jilid* 1). But, with respect, the rate of RM28,000 per day was not proved by the defendant other than by relying on a Debit No DBP/003. It is trite law that parties are bound by their pleadings (*Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v Kannamah* [1993] 3 MLJ 730; and *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC)). And that evidence led must be confined to the issues raised in the pleadings (*Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ 1113 (SC)); and

(c) His Lordship also relied on the oral evidence of Wan Abu Halim bin Wan Ismail ('DW4') and DW4 referred to the written evidence which have not been admitted as evidence during the trial. This was conceded by DW4 during the trial that he could not have remembered the terms of the LAD between the employer and the defendant. In cross-examination at p 268 of the appeal record at *Jilid* 3, DW4 responded to the question posed in this way:

> P: Encik Wan Abdul Halim, can you just look at your question and answer number 8 please. You were asked 'How can you remember all these terms'. Well, you said 'The company has in its records a copy of the letter of award the company had issued and I looked at this records before I came to give this evidence and I refreshed my memory by looking at the letter of award'. Now, according to you the letter of award was dated sometime in 1997. So, that was nearly 13 years ago. Would it be fair to say that if you didn't look at the, if you hadn't refreshed your memory you wouldn't be able to remember the terms?
>
> DW4: Yes, that would be fair.

Now, Edgar Joseph Jr J (later SCJ) in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 held that such oral

evidence to be inadmissible evidence. That being the case, the oral evidence of DW4 on this point should have been disregarded.

[28] These misdirections constituted serious errors of fact and no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. In our judgment, under these circumstances, an appellate intervention is warranted (*Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC)).

THE SECOND SCENARIO

[29] Judicial appreciation of the facts and the law are wanting and this attracted and warranted intervention by us. Chang Min Tat FJ writing for the then Federal Court in *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 at p 142, in this context, had this to say:

> But, quite clearly, his decision was reached via an inference drawn entirely from a serious error of fact and in drawing this inference, he had not merely considered evidence which was not established but had failed to take into account the probative value of evidence which had been proved or was common to both parties.

[30] In regard to the counterclaim advanced by the defendant, it was argued by the defendant that the learned High Court judge was right in allowing the defendant's counterclaim bearing in mind that His Lordship had found that all the witnesses for the defendant had sufficiently substantiated and proven the amount claimed on the deductions for back charges as well as the failure on the part of the plaintiff to provide the ten years' warranty and for damages for the late completion of the construction works by the plaintiff.

[31] With respect, the learned High Court judge failed to appreciate that there was no evidence advanced by the defendant to support the defendant's counterclaim pertaining to the following matters:

Back charges for works and services

(a) In regard to the claim for back charges which was referred to as item 'D1' in the CFP, the breakdown in the sum of RM104,690.84 can be found in the debit note captioned as DN No DBP/001 as seen at p 468 of the appeal record at *Jilid* 6. The plaintiff has accepted the deduction of RM89,436.84 as listed at item 1–7 of the said debit note. And this is also reflected at item D2 of the SFA. But the two additional items as seen in items 8–9 of the said debit note for the total sum of RM15,254.00 are disputed. For convenience, items 8–9 of the said debit note are worded as follows:

8. Repair of structural cracks at diaphragm wall and slab done by others: RM5,654.00

9. Seal off 4 inches diameter release valve at B3 slab: RM9,600.00

(b) it is significant to note that not a single receipt or invoice has been produced in court to support these charges. And there are no proper supporting documents to substantiate these deductions other than the said debit note. An extensive and searching cross-examination of PW1 on the subject of remedial works was undertaken, yet nothing came out of it. In short, the defendant failed to prove the sums spent as listed in items 8–9 of the said debit note.

The plaintiff's failure to provide for the ten years warranty against leakage at basement walls and slab

(c) In regard to the defendant's claim of RM760,000 computed on the basis of 5% value over the contract sum when the plaintiff failed to provide the ten years warranty for leakages, the defendant averred in its amended statement of defence at para 10 at p 69 of the appeal record at *Jilid* 1 to the following effect:

> Amaun sebanyak RM760,000.00 itu adalah satu estimasi kasar yang dibuat oleh defendan. Defendan akan menjelaskan bagaimana ia mencapai amaun ini di perbicaraan kelak.

But, the defendant failed to lead evidence in open court to show as to how the defendant arrived at the assessment of the amount of RM760,000. All that was available for perusal at the trial was a debit note captioned as DN No DBP/002 as seen at p 539 of the appeal record at *Jilid* 6 which showed the deduction of such sum; and

(d) the defendant also failed to prove its alleged loss and such failure must be held to be fatal. In *White Property Co Ltd v Birse Construction Ltd* [1999] All ER (D) 1376, Justice David Wilcox was concerned with the claimant's claim for relief against the defendant arising out of the wrongful refusal to provide warranties and His Lordship dismissed the claim because there was no evidence that the claimant has suffered an overall loss.

Damages for late completion of the construction works causing delay to the overall completion of the construction project

(e) There were inconsistencies between the defendant's pleaded case and the evidence advanced by the defendant. The defendant pleaded that the sum

of RM4,256,000 was for the loss of the financing charges, yet the defendant later claimed that the said sum was for LAD;

(f) the defendant also pleaded that there was a delay of 153 days based on the original completion date as at 23 May 1998. But the defendant later conceded that the contractual completion date was on 4 June 1998 as reflected at p 165 of the appeal record at *Jilid* 2 and at p 222 of the appeal record at *Jilid* 3 as well as at p 316 of the appeal record at *Jilid* 4. That being the case, the actual period of delay was not 153 days; and

(g) there was a failure on the part of the learned High Court judge to appreciate that, in the absence of any contractual provision for an extension of time to complete, time for completion would be set at large (*Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25 (SC)). Thus, under the circumstances, the counterclaim by the defendant for the sum of RM4,256,000 for loss of financing charges should be dismissed (*Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 (FC)).

[32] Based on the analysis as demonstrated, it is apparent that the learned High Court judge in allowing the counterclaim failed to appreciate that the defendant had failed to prove many of the deductions asserted and advanced by the defendant, the notable ones being the non-provision of the ten years' warranty tagged at RM760,000 and for late completion asserted to be in the sum of RM4,256,000. And once these deductions are disallowed, the plaintiff must be entitled to the unpaid balance sum under the CFP and that would be the sum of RM4,253,111.73.

[33] No reasons were advanced by the learned High Court judge for accepting the deductions. And no documentary evidence was led to establish the quantum of these deductions. And to compound the matter further, the quantum for these deductions was never put to the plaintiff's witness in the court below. This oversight attracts appellate intervention.

[34] The CFP sets out the damages for late completion to be in the sum of RM4,256,000. But, in the amended defence, these were pleaded on the basis of 'cost of financing' as reflected at pp 71–72 of the appeal record at *Jilid* 1 particularly at para 24. And no evidence was led as to the financing charges. That being the case, the defendant failed to prove its right to make such a deduction. Incidentally, it must be emphasised that there is no provision for liquidated damages in the letter of award.

[35] The plaintiff adopted the following arguments:

(a) that no delay was caused by the plaintiff;

(b) that the defendant failed to prove its alleged damages;

(c) that the defendant failed to put these alleged damages to the plaintiff's witness; and

(d) for these reasons, the plaintiff's appeal should be allowed.

[36] We agreed with the plaintiff's arguments. The plaintiff had practically completed the construction works within a reasonable time period and that was on 24 October 1998.

[37] Chua Sin Han ('DW1'), an engineer and the managing director of the defendant, was cross-examined along these lines at p 178d of the appeal record at *Jilid* 3:

Q: Bundle 'B' at page 162-D3-'Debit Note'?

A: Yes.

Q: Under (a) - 'Completion Date '. Do you agree that is not the correct date is(sic) 23.5.1998?

A: Yes, incorrect actually on 4.6.1998.

Q: Under (b) - 'Practical Completion …'. That is the date 24.10.1998. Do you agree that is the date?

A: Yes.

[38] Continuing at p 178e of the appeal record at *Jilid* 3, DW1 was cross-examined further:

Q: You agree the work practically completed in October 1998?

A: Yes.

[39] Yap Teck Fui ('SP1'), the managing director of the plaintiff, was asked and he said in examination-in-chief at p 100 of the appeal record at *Jilid* 2:

Q: Was the completion period for the works discussed between the parties?

A: Yes. The letter dated 10.7.1998 from the defendant to the plaintiff where the defendant confirmed that the works are to be completed by 27.10.1998 in accordance to the 'detailed' work programme attached to the plaintiff's letter dated 9.7.1998.

[40] The defendant's debit note DBP/003 dated 27 September 2002 prepared by the defendant and issued to the plaintiff which can be seen at p 517

of the appeal record at *Jilid* 6 clearly stated that the practical completion date was 24 October 1998 and the construction works were completed by the plaintiff on 22 October 1998.

[41] Next, the learned High Court judge in his grounds of judgment distinguished the two cases of *Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor* [2007] 2 MLJ 221; [2007] 1 CLJ 552 (CA); and *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 (SC) by stating that the documents in both these two cases were tendered by the makers whereas here the plaintiff was merely relying on two documents, namely, the SFA and the CFP to prove its claim without calling the makers of those two documents.

[42] It must be recalled that at the trial, both the SFA and the CFP were prepared and issued by the defendant.

[43] In regard to the SFA, there was a letter dated 9 December 1999 from the defendant to the plaintiff as seen at p 580 of the appeal record at *Jilid* 7 where the defendant enclosed three copies of the SFA to the plaintiff.

[44] The examination-in-chief of Yeong Mun Kien ('DW2'), the defendant's contract manager, can be seen at p 201 of the appeal record at *Jilid* 3 and there DW2 testified as follows:

D: Q. 36 Can you refer to p. 37-130 of Enclosure 29 Bundle C and explain the same to the court as to what these documents are.

DW2: It is a letter dated 9th December 1999 by defendant to plaintiff together with the draft final statement of account with respect of the subcontract undertaken by plaintiff for the project together with the attachments therein.

D: Q.37 Are you the maker of this document?

DW2: Yes.

[45] Under cross-examination at pp 239–240 of the appeal record at *Jilid* 3, DW2 testified as follows:

P: You said that the Certificate of Final Payment was sent in October 2002. Can you please turn to Ikatan C page 39. This is a Statement of Final Account. You agree that this Statement of Final Account was sent out by you to the plaintiff?

DW2: Yes.

[46] To put it mildly, DW2 was the maker of the SFA and he was the one who tendered it before the learned High Court judge.

[47] In regard to the CFP, by way of a letter dated 11 October 2002 from the defendant to the plaintiff which was received by the plaintiff on 12 October 2002, the defendant enclosed a copy of the CFP to the plaintiff. The letter dated 11 October 2002 can be seen at p 540 of the appeal record at *Jilid* 6. And the examination-in-chief of DW2 showed that the CFP was prepared by him. At p 201 of the appeal record at *Jilid* 3, DW2 was asked this question and he gave a positive reply:

D: Additional question My Lord. Q37(a) Bundle B page 186 (referring to the CFP), did you prepare this document?

DW2: Yes.

[48] Since the defendant's witness DW2 admitted issuing both the SFA and the CFP, the defendant has admitted that:

(a) the contract sum under the subcontract for the construction works was in the sum of RM15,000,000;

(b) the revised contract sum came up to RM15,462,548.57;

(c) to date, the defendant has paid the plaintiff the sum of RM11,200,000;

(d) the practical completion date of the sub-contract for the construction works was on 24 October 1998 while the construction works were completed on 22 October 1998; and

(e) the balance remaining sum is due and owing to the plaintiff and payable by the defendant.

CONCLUSION

[49] We unanimously allowed the appeal of the plaintiff with costs of RM80,000 here and below. We set aside the decision of the learned High Court judge. We gave judgment in favour of the plaintiff in the sum of RM4,253,111.73. We reduced the defendant's counterclaim to RM104,690.84 only. The deposit to be refunded to the plaintiff.

[50] Our brief reasons were as follows:

(a) the LAD of RM28,000 per day was not pleaded by the defendant. What was pleaded was the financing costs;

(b) the sum of RM760,000 in respect of the non-providing of warranty was

not proven. It was arbitrarily determined by the learned High Court judge based on 5% out of the contract sum of RM15,462,548.57. Therefore the sums of RM4,256,000 and RM760,000 should not have been deducted from the CFP; and

(c) we took into account the concession of learned counsel for the plaintiff that there was no ten years' warranty given by the plaintiff to the defendant in breach of the contract. And it was because of this concession that we made an order that the counterclaim be reduced to RM104,690.84.

[51] Having announced our decision in open court, learned counsel for the plaintiff in the person of Mr Khoo Guan Huat wrote a letter to the deputy registrar of this court and sought an appointment to see this panel to clarify two questions, namely:

(a) Sama ada tuntutan balas responden/defendan sejumlah RM104,690.84 boleh ditolak/set-off daripada jumlah Penghakiman RM4,253,111.73 yang diawadkan kepada perayu/plaintif.

(b) Sama ada faedah dikenakan ke atas jumlah baki yang perlu dibayar kepada perayu/plaintif pada kadar dan tempoh seperti yang dituntut dalam pernyataan tuntutan perayu/plaintif.

[52] Mr Amarjeet Singh acting for the defendant objected and by letter he conveyed his objections in this way:

> Temujanji berkenaan deraf perintah itu adalah satu percubaan untuk menambahkan perintah-perintah yang jelas tidak diminta dan tidak diperintahkan oleh panel Mahkamah Rayuan pada tarikh 22.2.2012 itu.

[53] We declined to meet learned counsel on both sides and through the deputy registrar we clarified the two questions in this manner:

(a) Tuntutan balas responden defendan berjumlah RM104,690.84 tidak boleh ditolak/set-off daripada Penghakiman RM4,253,111.73 memandangkan bahawa tuntutan balas adalah tuntutan yang berasingan (a counterclaim is a separate claim).

(b) Berdasarkan tuntutan perayu plaintif, Mahkamah Rayuan telah memberi Penghakiman RM4,253,111.73 dan mereka berhak ke atas jumlah Penghakiman tersebut.

(c) Manakala tuntutan balas responden defendan dibenarkan terhad kepada RM104,690.84 sahaja.

(d) Persoalan set-off tidak berbangkit langsung.

(e) Berkenaan dengan isu faedah, ianya tidak dihujah di hadapan kita. Walau

bagaimanapun, perayu plaintif berhak mendapat faedah statutori ke atas RM4,253,111.73 berdasarkan 8% setahun (per annum) daripada tarikh Penghakiman sehingga tarikh pembayaran (a statutory interest of 8% per annum from the date of judgment to the date of payment).

[54] Learned counsel on both sides have assisted us in arriving at our decision and we are grateful to them.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor